Philosophical Legacy on Issues in Nigerian Public Law

Edited by

Suleiman Ikpechukwu Oji, Ph.D, B.L

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SHARIA AND COMMON LAW: AN EXAMINATION OF THE CONFLICT OF A DUAL LEGAL SYSTEM IN NIGERIA

Gbadebo A Olagunju*

INTRODUCTION

The geographical entity called Nigeria today formally came into existence in 1914 when Lord Lugard, the representative (then Governor-General) of the British colonialist amalgamated (merged) both the Southern colony and the Northern Protectorate together to form one giant country.[1] Before then both areas and regions had been administered under British rule along separate lines. For easy administration however, and probably for cost effectiveness too, the merger became imperative.

Since the merger, the two regions, like the marriage of the gods have remained glued together in spite of all odds in terms of political differences, economic development, religious beliefs, educational attainment and cultural outlook. The Southeastern part of the country once tried to secede (break away) from this union. This was in 1967.[2] Consequently, a very bloody civil war broke out. This raged on for nearly three years with heavy casualties and carnages resulting in massive loss of lives both on the side of the Federal government of Nigeria on the one hand[3] and the Southeastern part on the other.[4]

At last in 1970, both sides to the fratricidal war agreed to sheath their swords only after the seceding side was almost overrun by the federal side. Even though the secessionists voluntarily surrendered, the federal side in a spirit of brotherhood and magnanimity declared what could have been regarded as its victory, a "no victor no vanquished" one, all in the spirit of reconciliation.

Once more the union came together as one under the leadership of General Yakubu Gowon until 1975 when his military government was terminated in July of that year after ruling the country for nine years. Since then several other administrations have administered the country till date and Nigeria has remained one entity. The largest African most populous nation in the world.

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1 See Falola T (eds.) (1991), History of Nigeria 3, Longman Nigeria Plc., p.4.

2 Falola T, op. ct., p.113.

3 Then under the military rulership of General Yakubu Gowon.

4 Which by then had declared an independent republic known and called the 'Biafran republic' headed by Colonel Odumegwu Ojukwu. See Falola op.ct., p. 113.

In the process of administration by these successive governments, the legal order that permeated the country had always been three.[5] The common law inherited from Britain (the country's colonial masters); the customary law (involving the traditions and customs of the people); the Sharia (or Muslim law sometimes categorised under customary law).[6] Understandably, the common law dominated the others as a result of British influence no doubt. In fact, the provisions of the High Court laws in the country made sure that any rule of customary (Islamic law inclusive) that is 'repugnant to natural justice, equity and good conscience', 'incompatible with any written law (or any law for the time-being in force)' or 'contrary to public policy' is rendered invalid and of no effect.[7] These were of course yardsticks and standards set by common law which the other laws were (and are still) expected to meet or rather conform with, or suffer failure of application and be declared as invalid by the courts.

Sometimes there have been conflicts and frictions arising from this subjection of the application of customary law (and Islamic law) to common law standards but in the end, it always result in victory for common law because even the post-colonial governments usually at the centre, most often prefer it to be so.[8] Nigerian legal system could therefore be rightly said to be dominated by common law even though customary law (which of course include Sharia-Moslem law) is given recognition.

Today however, the victory of common law over Islmic law in particular seems to be turning into Pyrrhic victory. The silent agitations of the Muslim population in Nigeria are daily turning into full-blown conflicts especially in certain parts of the country, which are predominantly Muslims.[9] Unless this is properly managed by successive administrations in the country, and also sufficient education and enlightenment done, the situation may result in real crisis in the very near future and may signal the demise of the nation amongst other agitations already piling in the country.

It is the aim of this work to examine the different legal systems recognised, and in operation in Nigeria; their historical antecedents and inter-relationship in order to see how they have contributed or otherwise to the development of Nigeria, and its legal order. The paper shall also examine how the continued application of these legal systems can help chart a peaceful future co-existence for Nigeria as a geopolitical entity within the West-African sub region and the African region at large.

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[5] Though advertently and intentionally categorised as two- common law and customary law.

[6] See Niki Tobi (1996), Sources of Nigerian Law, MIJ Professional Publishers Limited, Lagos, p. 136. Tobi is a Nigerian scholar of high repute who later got appointed to the Nigerian Court of Appeal. He presently serves as a Supreme Court Justice in Nigeria.

[7] See for example section 26 of the High Court Law, Lagos State, 1973.

[8] See generally cases of internal conflicts between English Law and Customary such as Green v. Owo (1936) 13 N.LR, 43; Apatira & Anor V. Akanke & Ors. (1944) 17 N.L.R, 149; Savage v. Macfoy (1909) Ren. 504; Fonseca b. Passman (1958) W.R.N.L.R. 41. See further Niki Tobi, op.ct., p. 153.

[9] This is the Northern part of the country that has a ratio of about 8 Muslims to 2 other religions in an average comparison of 10 persons.

THE LEGAL SYSTEM IN THE AREAS NOW CONSTITUTING NIGERIA BEFORE THE ADVENT OF THE BRITISH IN 1861

Before the advent of the British in Nigeria around 1861, justice had been administered in the various societies and ethnic groups, which later constitute Nigeria. The administration of such justice normally of course was tailored along the system and the ways of the people, which cannot be regarded as sophisticated as that of the British or what we have in existence today.[10] All in all however, as noted by a learned scholar on the subject: *'It was designed to ensure stability of society and maintenance of the social equilibrium. The most important objective was to promote communal welfare by reconciling the divergent interest of the different peoples.[11]"*

Among the Hausas and the Yorubas where the *Emireship* and the *Obaship* style of governmental administration had taken firm roots, the administration of justice was even more organised, with the *Emir* or the *Oba* serving as the fountain of justice. There were other institutions assisting the *Emir* or the *Oba* in the dispensation of justice. Thus in the North we had (and still have till today) such institutions as the *Waziri* who was next to the Emir; the *Alkali* or Chief Justice who was charged directly with the administration of justice; and the *Dogaris* or policemen who assist the *Alkalis* in the enforcement of the law. In Yorubaland, we had (and still have till today) the *Oba* and his itinerary of Chiefs comprising the *Otun*, the *Osi*, and the *Balogun* etc. all surrounding and assisting him in one form or the other in deliberations concerning the community and dispensation of justice thereof. When sitting in court, the Oba may sit alone (as the sole fountain of justice), or together with a number of these chiefs for consultation as the occasion demands. Talking specifically about Ajido town, an 'egun' settlement to the north east of Badagry Township claimed to have been founded around early 19th century (c. 1830 or 1840), Kunle Lawal had this to say:

> *Considering the fact that the newly established Ajido town had years of organized political administration behind it, the government of the town was under the Oba of Ajido assisted by a council of chiefs. These included: Vokogun, Hunga, Gagbo, Agbasagan, Soyongan, Saga, Awhenga, Sumn and Ogoga. Important decisions of the king and his council were made known to the people through the Zangheto, a form of night guard who looked after the town. Other awe-inspiring institutions in Ajido were Gbemnbo (the most revered), Sindo, Verekete, Agbeye, Tomegu and Topodum.*[12]

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10 See Niki Tobi, op. ct. p. 1

11 Niki Tobi, op. ct. 1.

12 See Kunle Lawal, The "Ogu-Awori" Peoples of Badagry Before 1950: A General Historical Survey, *Readings in General Studies*, Lagos State University Vol. 2 (2006), Dapo F. Asaju (ed.), 22. Kunle Lawal is a Nigerian and an erudite Professor of history at the Lagos State University, Nigeria.

Usually judgement is final is such case (s) and there is no right of appeal,[13] although in certain special circumstances, a trial may be re-opened only by the same authority if fresh evidence comes to hand, with a view to be just and fair in the end.

Because of the traditional close-knit family system in Africa, sometimes the settlement of disputes (and dispensation of justice thereof) usually start from the family unit with the head(s) of the family taking position as judge(s) or arbitrator(s). in republican societies like Igboland a continued extension of this is further seen in the larger community where the elders constitute themselves into court for the purposes of dispensation of justice. Thus Eweluka noted:

> *In republican areas, like Igboland, the government of each autonomous community- a town or clan was literally in the hands of all the adult male members, though in practice controlled and directed by the elders and, in some cases, titled men. A case could be heard first, by the male members of the family or families concerned; from their decision an appeal usually went to an association of all the male members of the village concerned and thence to the association of all the male members of a forum. In practice, disputes were usually entrusted to the elders to settle, except where special reasons existed to demand that a particular case should be heard or determined by all the male members of a family, village or town.*[14]

What is of importance to us at this stage, is that the dispensation of justice in all these traditional settings do not necessarily follow the pattern of the British system or type of court with all its formality and paraphernalia of trials- such as a modern court room setting; the dock or witness box; and counsel sitting at the Bar playing the legal gladiators on behalf of their clients. Far from these. What you rather see is a simple local setting either within the family compound, or the community hall/square, or in some instances the precincts of the Emir or the Oba's palace. In whatever setting however, justice was dispensed.[15]

THE SHARIA AS AN ESSENTIAL INSTRUMENT OF JUSTICE DISPENSATION IN SOME PARTS OF NIGERIA BEFORE COLONIALISM

It is on record that Islam and its constituents such as Sharia had reached certain parts of the region now called Nigeria today long before the British colonialists came. History shows that with regard to areas constituting the North of Nigeria,

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[13] This is why the Oba in Yorubaland is sometimes referred to as 'Kabiyesi'- meaning 'nobody can query your judgment', thus indirectly equating the Oba's verdict to that given by God. This is backed up by further describing him as 'Alase ikeji Orisa' i.e. the second in command to God.

[14] See Okonkwo, C. O., *Introduction to Nigerian Law* (Sweet and Maxwell, London, 1980), 56-57. Eweluka is a Professor and a Nigerian scholar of Igbo stock.

[15] See Olagunju, G.A. Historical Development of Nigeria's Legal System from Colonialism to Present, in Dapo F. Asaju (Ed.), (2006), *Readings in General Studies*, Vol. 2, Centre for General Nigerian Studies, Lagos State University pp. 306-308.

Islam and its practices (Sharia) inclusive had not only been well established, but also deeply entrenched as the way of life of the people. Opeloye[16], referring to al-Bakri wrote: *'Islam reached Kanem through the Kawar-Fezzan route in AD. 666. Though there are various claims regarding the exact date of Islam's penetration to the kingdom, what is certain is that by the 11th century, Islam was already made a state religion.*[17]

The Kanem, which later became Bornu Empire in 1386 C.E. constitute major part of Northern Nigeria together with the Hausa-Fulani Empire. Historical sources show that the first Mai (ruler) of this area (Kanem) who embraced Islam and introduced its practices to the empire was one Hume Jilme who ruled between 1087-1097 C.E. It was this ruler who made Islam the official religion of the kingdom.

The religion and its practices suffered set backs (such as adulteration etc.) after Idris Alooma until around the 19th C., when Mohammed al-Kanem became Mai. The latter having studied in al-Madina (Arabia), Cairo (Egypt) and Fez for about thirteen years successively tried to bring back the old glories of Islam and its practices to the kingdom until his death. He was succeeded by his son- Umar (1855-1880). The latter brought sweeping reforms to the religion and its practices. First, he changed the title from Mai to *Shaykh* thus making him the very first *Shaykh* of Borno; second, he made Arabic the official language of the kingdom; third, he founded a new capital in Kukawa and; fourthly, he appointed a number of functionaries for the already established offices of the kingdom prominent among which was the *qadi.*[18]

The religion (and its practices) was introduced into Hausaland around the 14th century C.E. due to contacts of the major inhabitants of the area with trans-Saharan traders who were mostly Islamic Merchants. Thus according to Opeloye:

> *The second wave of Islamic penetration to Nigeria was through Hausaland and this was during the first half of the 14th century C.E. By the 15th century, during the reign of Sarkin Kano Muhammed Rumfa between 1463 and 1499, the religion had been well established in the region.*[19]

The above assertion could probably be due to the fact that the first Hausa rulers to embrace Islam did so around this period. These were the first Muslim rulers of Kano and Katsina who were Ali (1349-1385 C.E.), and Mohammed Korau (1320-1353 C.E.) respectively. Yauri had its first Muslim ruler around 1578 C.E., while

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[16] An astute Nigerian Islamic Scholar of repute, a Professor of Islamic Studies and former Dean, Faculty of Arts, Lagos State University, Nigeria.

[17] See Muhib O. Opeloye, *Building Bridges of Understanding Between Islam and Christianity in Nigeria* (2001), Lagos State University inaugural lecture series, p. 2.

[18] A learned Islamic Judge. See Ambali, M.A (2003), *The Practice of Muslim Family Law in Nigeria*, Tamazana Publishing Company Limited, Zaria, Nigeria, p.60 for further explanation of a qadi. In fact at page 64 of the same book, he stated thus: "A qadi is then the judge who applies the principles of Shari'ah to decide and enforce the court's decision as it affects the parties in dispute." See also pages 67 and 148 of the same book. See further, Sections 261 and 276 of the 1999 Constitution of the Federal Republic of Nigeria 1999.

[19] Muhib O. Opeloye, op. ct., pp. 2-3.

Zamfara had its own around the 17th century C.E. In Nupeland, the first Muslim Etsu emerged around the 18th century C.E.

One significant ruler of this period that we cannot fail to mention is Mohammed Rumfa (1463-1499). It was he who brought unprecedented changes to Islamic Scholarship in Kano during this era. His rule attracted learned Islamic Scholars from various parts of the Muslim world to Kano among who was Muhammed b. Abdul'l-Karim al-Maghili, a professor at the famous Sankore University in Timbuktu.

By the 18th century, Islam had made its inroads into almost every part of Hausaland, and its practices had been inculcated into every aspect of their lives. In other words, it had become a way of life to them, their tradition and culture. Of this Opeloye also noted: "*By the 18th century, the entire Hausa States had been islamised and that meant islamisation of the people's way of life. The socio-economic system, the political system and even the educational system were all organized in consonance with Islamic principles*[20]"

Again, the religion and its practices suffered another set back before the turn of the century. This time, a very serious one due to adulteration and mixture with certain cultural and traditional practices, and abuses. This factor led to the reformist-Uthman dan Fodio's jihad in the early 19th century. The jihad was a success, which saw the establishment of an Islamic State in Hausaland, where Sharia was applied in full force.

In the south, the religion and its practices were embraced around the 17th century.[21] Unlike in Hausaland where rulers embraced the religion and passed it down to the people, here it was more of a private/individual concern. The followers having accepted it quietly and peacefully through contacts with itinerant scholars and traders.[22] In some other parts however, the rulers also embraced it and in fact introduced the Sharia legal system. These were in Ede (1900) during the reign of Oba Abibu Lagunju; Iwo (1906) during the reign of Oba Momodu Lamuye; and Ikirun (1912) during the reign of Oba Aliyu Oyewole.[23]

THE INTRODUCTION OF BRITISH LEGAL SYSTEM INTO NIGERIA AND ITS IMPACT THEREOF

English law was first introduced into Nigeria through Lagos in 1863. As a matter of fact, a court had already been established there since 1862 after the British administration made the place a colony.[24] By ordinance No. 3 of 1863, English law

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[20] Muhib O. Opeloye, op.ct. p.3.

[21] Opinions are however divided on this. Some scholars felt it was much earlier. See Opeloye, op.ct., p. 3.

[22] See Gbadamosi, T.G.O., *The Growth of Islam among the Yorubas 1841-1908* (London: Longman, 1978), 172.

[23] These were all paramount rulers in their domain during this period. The word Oba is a Yoruba title meaning *paramount ruler* or *king.*

[24] Or settlement- a term, which Elias referred to as, been erroneous. See T. Olawale Elias, Q.C., (1963) *The Nigerian Legal System*, Routledge & Kegan Paul Ltd., London, 5. Elias, a Nigerian was an international jurist of

was formally introduced into the colony of Lagos and made effective from March 4, 1863. A Supreme Court was also established by the Supreme Court ordinance No. 11 of 1863 the same year. The jurisdiction of the court covered both civil and criminal matters. In 1866, another court of civil and criminal justice was established in Lagos, which replaced the Supreme Court. This was as a result of the central administration which the British government had formed to cater for their West-African settlements which include- Lagos, the Gold Coast (now Ghana), Sierra Leone and the Gambia. Appeal from this court (i.e. the court of civil and criminal justice) lay to the West African Court of Appeal (WACA), and from here to the Judicial Committee of the Privy Council in England.

In 1874, the Gold Coast colony was established comprising Lagos and the Gold Coast. As a result, the West African Court of Appeal ceased to function for the colony, instead by Supreme Court ordinance No. 4 of 1876, a Supreme Court was established for the colony of Lagos and the neighbouring adjacent territories in which the British government exercised jurisdiction. The common law of England, the doctrines of Equity, and the Statutes of general application in force in England as at July 24, 1874 were applied by the court. The local laws and customs were still applicable provided they were not 'repugnant to natural justice, equity and good conscience or incompatible with any local statute (or any law for the time being in force)'.

The Supreme Court was divided into three arms as follows:- the Full Court (which serves as an appellate court only); the Divisional Courts (having both original and appellate jurisdiction); and the District Commissioners' Courts. The indigenous courts on ground before the British administration still continued to function and the English court held that they had a right to so continue.[25]

On January 1st 1900, the "Protectorate of Southern Nigeria" was formed comprising of the Niger Coast Protectorate (which had earlier been established between 1885 and1891)[26] and the territories of the Royal Niger Company South of Idah. Under the order establishing the Protectorate, a High Commissioner was to be appointed who was empowered to make laws for the Protectorate by proclamation. By the Supreme Court Proclamation No. 6 of 1900, the Commissioner indeed established a Supreme Court for the Protectorate in 1900. This proclamation was in pari-materia with that of the Supreme Court Ordinance of 1876 earlier mentioned except that the effective date for the application of English law (common law, equity etc.) was to be the law in force from January 1st 1900 instead of July 24, 1874.

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high repute who became the President of the International Court of Justice (ICJ), the Hague, Netherlands, before his death.

[25] See the case of Oppon v. Ackinie (1887) in J. M. Sarbah, *Fanti Customary Laws* (3rd ed. 1968), 232, where the Supreme Court (Full Court) held that the 1876 ordinance did not in any way impair the pre-existing judicial powers of local chiefs.

[26] This consisted of Benin, Brass, Bony, old Calabar, new Calabar and Opobo.

Unlike previously when indigenous courts were left to function, a Native Court Proclamation No. 9 of 1900 was made establishing "Native Courts" where customary law was administered to the exclusion of any traditional authority or indigenous court.[27] Out of this arose the minor courts and native councils, which were in fact presided over by Britons and performed not only judicial functions, but also legislative and executive functions.[28]

Again on 1st January 1900, just like the South, the "Protectorate of Northern Nigeria" comprising territories of the Royal Niger Company North of Idah was formed. A Commissioner was equally appointed to make laws for the protectorate also by proclamation. By proclamation also, the Protectorate Courts Proclamation No. 4 of 1900 was made establishing a Supreme Court, Provincial Courts and Cantonment Courts. Native Courts were also established by the Native Courts Proclamation No. 5 of 1900. This Proclamation was based on the principle of leaving the emirs in their position of power with the intention of the British to exert control through the existing administrative and judicial structures already established by this institution, which they met on ground. As rightly observed by Rudd Peters:

> *The Native Court Proclamation of 1900 was based on this principle: The British Resident (provincial governor) could establish, with the emir's consent, native courts with full jurisdiction in civil and criminal matters over the native population. Thus the existing courts of the emirs and the alkalis were given official status in the new British colonial order. The judges were appointed by the emirs, with the approval of the Residents. They were to apply native law and custom, i.e. Maliki Islamic law.*[29]

The control and supervision of the native courts was however exclusively left to the British Resident who was given extensive powers to enter and inspect the courts; suspend, reduce and modify sentences given by them; or order a retrial before another native court or a total transfer of the case before a provincial court (where English Common Law is applied).[30] Describing his policy and Re-emphasising this power, the Governor-General Lord Lugard in an address given in Sokoto in 1902 stated as thus:

> *The alkalis and emirs will hold the Law Courts as of old, but bribes are forbidden, and mutilation and confinement of men in inhuman prisons are not lawful. (...) Sentences of death will not be carried out without the consent of the Resident. (...) Every person has a right to appeal to the Resident who will,*

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[27] This law was replaced by the Native Courts Proclamation No. 25 of 1901.

[28] E.g. power to make bye-laws for road construction, conservation of forests etc.

[29] See Ruud Peters, *Islamic Criminal Law in Nigeria*, (Ibadan, Spectrum Books Ltd., 2003), 6.

[30] See Keay, E.A. and S. S. Richardson, S.S, *The Native and Customary Courts of Nigeria* (London etc.: Sweet & Maxwell, 1966), 20-22.

however, endeavour to uphold the power of the Native Courts to deal with native cases according to the law and custom of the country.[31]

This Proclamation was replaced by the Native Courts Proclamation No. 1 of 1906, which established two kinds of native courts- the Alkali Court and the Judicial Council.

On January 1st, 1914 both the Colony and Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria were merged together (amalgamated) to form one political entity and christened with the unique name we now know the country till today- Nigeria, under the Governor-Generalship of Lord Lugard as the sole representative of the British government.

Three types of Court emerged from this union namely, the Supreme Court,[32] the Provincial Courts[33] and the Native Courts.[34] By 1933, a reform of the courts was due and so the Protectorate Courts Ordinance No. 45 of 1933 established a High Court and Magistrates' Courts for the country. Now the Provincial Courts were abolished and legal practitioners could appear in the High and Magistrates' Courts.

As can be seen so far, the introduction of English law into the country marked a turning point in the administration of justice as hitherto known to the people ('Natives'). With the British system type of courts and the formality of court procedures, an 'alien' culture began to creep into the peoples way of life. Of this, Obilade noted:

By the end of the period, one combined effect of the reception of English law, the establishment of English-type Courts and the relegation of local laws and customs was already being felt. It was the emergence of a new society consisting of indigenous people who had embraced the English culture and had therefore tended to prefer the English way of life to the traditional pattern of life. Such people entered into commercial relations governed by English law. The existence of that society side by side with the traditional society marked the beginning of the conflict of cultures now noticeable in many parts of the country.[35]

IS SHARIA CUSTOMARY LAW?

Perhaps it is apposite to discuss the issue at this juncture whether Sharia is indeed customary law? This is because under the dual legal system recognised by the British on their coming to Nigeria, the Sharia had never been recognised as a

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[31] See Karibi-Whyte, A.G, *History and Sources of Nigerian Criminal Law*, (Ibadan: Spectrum Law Publishing, 1993), 177.

[32] See the Supreme Court Ordinance No. 6 of 1914.

[33] See the Provincial Court Ordinance No. 7 of 1914.

[34] See the Native Courts Ordinance No. 5 of 1918.

[35] Obilade, A.O (1979), *The Nigerian Legal System,* Sweet and Maxwell, London, 20. Obilade holds the LL.M of Harvard and was a former Dean and Professor of Law at the University of Lagos, Nigeria. See also Adewoye. O, Prelude to the Legal Profession in Lagos 1861-1880, *Journal of African Law* (1970), 98 at 101.

separate system of law, but categorised under the customary law of the people.[36] This denial had therefore always been at the root of many conflicts in Nigeria.

The truth of the matter however, is that even before the advent of Islam in the country in the 12th century or thereabout, the Hausa-Fulani people had their customary/traditional practices which the new religion came to supplant. So it is not correct to conclude that Islam (or Sharia) was their tradition.[37] It would be more correct to say that Islam is their religion and Sharia (one of its practices) became their way of life. This has therefore made the latter to be indispensable to them unlike in the case of some traditional or customary practices, which can be easily dispensed with. Hence Professor Schacht wrote: *"Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself.[38]"*

If the above argument is accepted, then one is bound to agree and also disagree with the views of Professor Obilade earlier expressed.[39] Disagree in the sense that those who embraced the English culture had never been those who embraced Islam and Sharia. In fact they had always quarrelled with its imposition on them. Agree in the sense that for people in the North (at least the majority of those people), the existence of the English law/culture marked the beginning of conflict of cultures in that area. This conflict is now becoming pronounced more than ever before- that is almost one and a half century after its first introduction.

CONFLICT OF A DUAL LEGAL SYSTEM

Having said that the Sharia is not a customary law and ought not to have been so erroneously categorised, is there any justification for its continued existence as a separate and independent judicial system within the Nigerian legal system? It is this writer's humble submission that it ought to be for reasons hereinafter proffered.

It is a fact of history that ever since the practice (of Sharia) was introduced to Northern Nigeria, their cultural, traditional, business, economic, social and family life had been so influenced and adapted to this system that one can hardly separate the people from it. This was observed as far back as 1886 when the London Times reported that as at the time the Royal Niger Company reached Northern Nigeria in the 18th century, it met a well-organised system of justice on ground. The paper wrote: *"These people have their own laws and customs which are better adapted to their condition than the complicated system of British jurisprudence.[40]"*

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[36] See Niki Tobi, op. ct. p. 136.

[37] This was why in the first instance adulteration of the new religion with cultural practices earlier referred to in this work was possible. See pp. 7 & 8 (Supra).

[38] Schacht, J (1964), *An Introduction to Islamic Law,* Clarendon Press, Oxford, 1.

[39] See footnote 35 (supra).

[40] See London Times, 17th July, 1886

It is undoubtable that the English legal system is alien to Nigeria as a whole not just the North, and the British recognise this. Little wonder then that they allowed their laws to function side by side those they met on ground. A dualistic policy of sort. As noted by Elias:

> *The net result of this policy has been to produce in Nigeria, as elsewhere in the British colonial empire, a dualism in the legal system whereby English ideas of law and justice are administered side by side with the traditional laws and customs of the local communities. The incorporation of rules of English law in the legal system of a colonial dependency has been rendered necessary by reason of the presence therein of a number of English people to whom it is as much necessary to preserve their accustomed notions of right and justice as it is that certain indigenous ideas, legal as well as customary, should be vouchsafed to the local inhabitants; besides, new legal situations naturally follow in the wake of modern transactions between the two, and as these are often foreign to traditional legal ideas English law has to be adopted by the local people.*[41]

In effect, even though customary law (Sharia inclusive) was allowed to function alongside English law, situations however often arise where it becomes inevitable that English law must be used to totally supplant local or customary law. Even in those situations of dualism, the customary law (Sharia inclusive) and practices must not be found 'repugnant to natural justice, equity and good conscience, nor incompatible with local statutes'.[42] This test considerably whittled down and eroded the efficacy of Customary/Sharia law against their English counterpart. These are the tests of validity for the application of any customary or Sharia law.

It is therefore of little wonder that those who consider Sharia as fundamental to their religion (Islam) began to feel uncomfortable at the subjection of their belief and practices to English law. In fact, it was an humiliation of sort to them. Hence from the very beginning there had always been agitations against this kind of subjection. Records show that as far back as 1894, the Muslim community of Lagos colony petitioned the colonial ruler demanding the use of Sharia by Muslims. This demand was rejected. Again in 1923, another petition was raised by the Lagos Muslims, this time demanding that the colonial masters introduce Sharia Courts in the area. Also in 1938, a group of Islamic scholars and students in Ibadan demanded for Sharia.[43]

In 1948, the Muslim Congress of Nigeria with headquarters then at Ijebu-Ode also petitioned the Governor of Nigeria complaining of violation of their fundamental Human Rights as Muslims living in the South where they are subjected to common law. This congress thereafter submitted a memorandum to the Brook

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[41] Elias, op.ct., footnote 24 (supra), also at p. 5.

[42] See the case of Guri v. Hadejia Native Authority (1959) 4 FSC 44.

[43] See Abdul Jelil Amoloye, Muslims in the Legislature, Paper presented at the Conference on the 1999 Constitution and the Sharia, Ilorin, pp 4 and 6.

Commission of Inquiry headed by Mr. Justice Brook, the then Chief Justice of Nigeria. The Commission's assignment was to investigate the working of the native court system with a view to reviewing the law to be administered in these courts.[44] The Memorandum called for the establishment of Muslim courts in the South. The gravamen of the Memorandum was that among the over four thousand divorce cases handled by the native courts, ninety-five per cent involved Muslims, and these were arbitrarily handled, resulting in separating the Muslim couples involved 'like dogs'. They therefore prayed the Commission "to grant our request for a separate Muslim court".[45] They went further: "*The condition of our courts is even worse in the case of the Law of inheritance. Our Native Authority Civil Court that grants letters of administration does not know any Muslim law governing this matter.*[46]"

The issue (of Sharia) came up again with the Constitutional Drafting Committee (CDC), which considered the type of constitution to be adopted/drafted for Nigeria's second republic between 1975/76. The Committee recommended the establishment of a Sharia Court of Appeal for the Federation and also one each for the states. This idea was later dropped at the Constituent Assembly.[47]

The debate over this system of law (Sharia) in Nigeria raged on throughout the second republic, particularly as to the extent of its application. Whether it should be limited to the realm of private and individual matters (private law i.e. such as family law and inheritance) or be extended to cover public law (such as crimes etc.)
It should be pointed out that the Sharia Criminal law had earlier been codified into the Penal Code as far back as 1960 in Nigeria, but because this code modified certain aspects of the Sharia,[48] there had always been grudges against it. The agitators of course wanted a full-blown Sharia without any modification. It matters little to them whether flogging, stoning or amputation is 'uncivilised' as long as it was decreed by that law (Sharia) which is an aspect of their religion.

CONFORMING TO STANDARDS

Perhaps at this point what we should consider is what standard is a law expected to meet or conform with before it can be so regarded? And who determines such standard? A legal system may be described as the sum total of all laws in a particular society, or setting, or community. System itself connotes a kind of orderliness or a particular way of doing things.[49]

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[44] See Karibi-Whyte, op.ct., footnote 31 (supra) at 176.
[45] See Anderson, J.N.D. (1970), *Islamic Law in Africa*, Frank Cass and Company Limited, London, p. 222
[46] Anderson, J.N.D. op.ct., 222-223.
[47] See Belgore, A.O. History of Sharia in Nigeria, Paper Presented at the Conference on the 1999 Constitution and the Sharia, Ilorin, p. 20.
[48] For example, the altering of most punishments originally prescribed under the Sharia e.g. imprisonment to replace flogging, stoning or amputation etc.
[49] See Dias, R.W.M (1985), *Jurisprudence*, Butterworths, London, 47. See also Lord Lloyd of Hampstead, Q.C., and Freeman, M.D.A (1985), Lloyd's Introduction to Jurisprudence, Stevens & Sons, London, 344.

Talking about the Nigerian legal system therefore, following from the fore goings, Sharia is one of those laws that sum up the totality of all the laws in Nigeria. Talking about standards would it then be right (or wrong) to say the standard of Sharia is low or uncivilised, especially when juxtaposed with English law (in view of the repugnancy provisions laid down by the latter)? This it is submitted is purely a subjective issue, for indeed what is objectionable to one person may not necessarily be to another. In fact that which is objectionable to me may be acceptable to another person especially when the issue of religion and belief comes into the picture. What is civilised under Sharia may be uncivilised under English law.

This issue is not made any means easy especially with some Muslims regarding English law as Christian (or Biblical based) law. This claim is justified when dictum such as that in *Bowman v Secular Society Ltd.*,[50] before the English court is considered. Therein lord Summer declared: "*English Law may well be called a Christian Law, but we apply many of its rules and most of its principles, with equal justice and equally good government, in heathen communities and sections, even in courts of conscience...*"

In the same case, Lord Finely, then Lord Chancellor of England also declared: "*There is abundant authority for saying that Christianity is part and parcel of the laws of the land- but the fact that Christianity is recognised by the law is the basis to a great extent for holding that the law will not help endeavours to undermine it.*"

An Islamic scholar observing the extent of this (Christianity's) interference with English law noted as follows: "*Every year, the Assizes and the legal year are opened with church service. All judicial officers whether Muslims or Christians are required to attend such church services. These are clear indications of the Christian orientation of the Common Law.*[51]"

From the foregoing, a country such as Nigeria with its very large Muslim population must be very careful of falling into the fallacy of setting standards of civility. The tendency under this situation is for the Muslims to feel that there is attempt to impose Christian law (not English law anymore) over them. Religion therefore will seem to be the issue. A sort of imposition of belief. A time has come for all of us to accept the peculiar nature of the Nigerian society as a multi-religious (not secular) country.

CONCLUSION

This paper has tried to examine the legal order in Nigeria in the pre-colonial times, and what the justice dispensation then was like. It also tried to trace the introduction of Islam (and Shari 'ah) into certain parts of Nigeria and also how the people responded and have utilised this Islamic law (Shari 'ah) as an instrument of dispensing justice among themselves.

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[50] (1916-17) A. C., 406.

[51] See Malik, S.H.A, Sharia 'ah: a legal system and a way of life, *Perspectives in Islamic Law and Jurisprudence* (eds.), (2001), 37. See also Is-haq Akintola, *Shari 'ah in Nigeria: An Eschatological Desideratum* (2001), 151.

The paper then discussed the introduction of English law into the entity now called Nigeria from the annexation of Lagos in 1861 to the various colony and protectorate treaties ending up in amalgamation of the whole country in 1914. The various agitations by Muslims, against this system as an imposition of alien culture over their belief and practice (Islam and Shari 'ah) was also examined. What is left to be discussed in this concluding part therefore is what are the options left for Nigeria as a country to avoid crisis in the application of its legal system? What is the way forward?

It is a known principle that whenever there is a society of human beings with different ideas, different beliefs and different cultural backgrounds such as Nigeria, there are bound to be differences of opinion almost all the time. Nigeria is actually many countries pulled together into one by the British administration for easy governance, under an executive fiat (as seen through the several proclamations already discussed), during the early days of colonisation.

Nigeria as a nation has however grown considerably since those early days of British rule and suzerainty. It has moved from colonialism to independence, to military rulership, through civil war, to democracy, back to military rule again, and now back again to democratic rule. It has even experimented between the British parliamentary system and the American Presidential system of governance all in the name of searching for a stable polity to enhance her political prowess and economic growth with a bid to provide better standards of living for its people, and be respected in the comity of nations.

We must however always remember in our search for sustainable and stable system of government, that Nigeria is not Great Britain, neither is it America. Nigeria is Nigeria. A peculiar country with a peculiar people, peculiar culture, peculiar beliefs, peculiar environment, and peculiar outlook to life. Most of the time, even our leaders (the Nigerian leaders) want to think (and in fact act) like the British or the American. And so we have always failed in the management of crisis and issues. This is not to argue that we should dispense with or jettison overnight the influence of positive western civilisation. This may not even be easily achievable considering the fact that such influences have stayed with us for well over a century and a half. We must however begin to look out for areas of harmony in all that we practice- religion, culture, law etc. Harmony it is said is sometimes (if not all the time) greater than justice. Experience and history have shown that the negotiation table usually prevails over all the shootings, killings and carnages that sometimes pervade the crazy war front. The negotiation table therefore, not the battlefield should be preferred in all cases of conflict.

Nigeria presently is going through another phase of democratic experience. If democracy is all about freedom of choices, then it is only appropriate that if a particular state in the federation, or a section within the Nigerian geopolitical entity wishes to adopt a particular legal system (such as Shari 'ah) it should be allowed to

do so, without prejudice to the rights of others, and provided such act is constitutional. If such a state or section does so arbitrarily, or in error of law, then there should also be constitutional means of checkmating same (preferably through the courts) and not by executive fiat, political insinuations or religious incitement which could degenerate into crisis. Perhaps one advise to give the antagonists of Shari 'ah is that, that practice cannot be separated from Islam. If Islam is recognised and accepted as a religion then you have to give Shari 'ah to its practitioners. There can be no contesting the fact that wherever you find Islam, there will always be a corresponding re-echoing of Shari'ah. One can hardly be separated from the other like a Siamese.[52]

Finally, this writer feels that it would not be out of place in a work of this nature to once again remind all of us (both the protagonists and the antagonists of Sharia), of that beautiful saying once echoed by an erstwhile American President thus: *'Let us celebrate our common humanity and not our differences"*

[52] See Ballantyne v. M., Back to Shari 'ah!?, *Arab Law Quarterly*, Vol. 3, Pt. 4, (November 1988), 317 especially at 319.